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MISCELLANEOUS CITATIONS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 712

JULIUS SALSBURG,

Appellant,

vs.

STATE OF MARYLAND

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendant-appellant submits herewith his statement particularly disclosing the basis upon which he contends that the Supreme Court of the United States has jurisdiction on appeal to review the decision and judgment entered in this cause by the Court of Appeals of Maryland, the highest court in the State of Maryland.

Opinions Below

The first opinion of the Court of Appeals of Maryland, which decided that the constitutionality of the challenged statute was squarely presented for decision in the case of this appellant, is reported in 93 A. 2d 280. The second opinion of the Court of Appeals of Maryland, which decided

in favor of the validity of the challenged statute, is reported in 94 A. 2d 280. Both of said opinions are attached hereto as Appendix A.

Jurisdiction

The final judgment of the Court of Appeals sought to be reviewed was entered on February 5, 1953, being the same day on which the second opinion in the case was filed. The first opinion in the case was filed on December 12, 1952. The date the application for appeal to the Supreme Court is presented is March 26, 1953.

In this case there was drawn in question the validity of a statute of the State of Maryland, hereinafter set forth, on the ground of its being repugnant to Section 1 of the 14th Amendment of the Constitution of the United States. The appellant was on trial in the Circuit Court for Anne Arundel County charged with committing a misdemeanor by violating the gambling laws of the State of Maryland which prohibit the making of book on the result of horse races. The admissibility of the evidence upon which appellant was ultimately convicted depended upon the constitutional validity of the challenged statute, and the decision and judgment of the Court of Appeals of Maryland (being the highest court in the State) were in favor of its validity. The jurisdiction of the Supreme Court to review this decision and judgment by appeal is conferred by Title 28, United States Code, Section 344(a) (28 U. S. C. A. 1257(2)). The following decisions sustain the jurisdiction of the Supreme Court to review the decision and judgment on appeal in this case: *Ward* v. *Maryland*, 12 Wall. 418, 423, 424 (1871); *Home Insurance Co.* v. *Augusta, Ga.*, 93 U. S. 116, 121 (1876); *Foster* v. *Kansas*, 112 U. S. 201, 205, 206 (1884); *Cissna* v. *Tennessee*, 246 U. S. 289, 293, 294 (1918); *Chicago, R. I. & P. R. Co.* v. *Perry*, 259 U. S. 548, 551, 552 (1922); *New York* v. *Zimmerman*, 278 U. S. 63, 67-69.

(1928); *Charleston Fed. Sav. & L. Assoc.* v. *Alderson*, 324 U. S. 182, 185-186 (1945); *Illinois* v. *Board of Education*, 333 U. S. 203, 206 (1948); *Kedroff* v. *St. Nicholas Cathedral*, 97 L. Ed. (Advance) 95, 98 (1952).

The federal questions sought to be reviewed were raised at the time and in the manner hereinafter set forth, namely:

a. They were raised in the trial court on June 13, 1952, by the appellant's filing of a motion to suppress the evidence, which said motion was heard on the same day prior to the trial on the merits.

Paragraph 4 of said motion to suppress specifically referred to the evidence as having been "illegally obtained from your Petitioner as the result of an illegal and improper search and seizure, guaranteed the Defendant under the Maryland State and United States Constitutions, as well as the existing State Laws relative to search and seizure and search warrants relating thereto" (R. 5). Prior to hearing testimony on the preliminary motion to suppress, the trial court said:

> "* * * If they [the police] had a right, assuming that the Bouse Act [the state-wide statute excluding illegally procured evidence in the trial of misdemeanors] had been amended *and that amendment was validated*, they wouldn't have to worry about a misdemeanor or the commission of any kind, they would have the right to go into the premises on the assumption the amendment of the Bouse Act gave them that right. * * *" (Italics supplied) (Appendix to appellant's brief in the Court of Appeals of Maryland, p. 5).

At the conclusion of the preliminary hearing, the trial court over-ruled appellant's motion to suppress (R. 14).

b. They were further raised in the trial court on June 13, 1952, during the trial on the merits by timely objection to the introduction of the evidence (R. 49-54 of trial record).

(Stenographic transcript of the testimony filed in the Court of Appeals of Maryland, pp. 10-15).

c. In the Court of Appeals of Maryland the federal questions sought to be reviewed were raised in the customary manner in appellant's printed brief filed in that Court and in the oral argument of his counsel, before the Court of Appeals of Maryland. In appellant's printed brief (p. 2), the federal questions were submitted as follows:

> "Is Chapter 704 of the Acts of 1951, which purports to amend the Bouse Act (Art. 35, Sec. 5, Md. Code, 1947, Suppl.) by making its provisions inapplicable to gambling cases in Anne Arundel County, Constitutional?
>
> "* * * Appellants contend * * * * * * * there is no rational basis or justification for the territorial classification made by the Act, which discriminates between Anne Arundel County and all other parts of the State with respect to the subject matter of the statute in question; and, therefore, it violates the equal protection clause of the 14th Amendment to the Federal Constitution and Article 23 of the Maryland Declaration of Rights."

d. In its first opinion and decision filed December 12, 1952, the Court of Appeals of Maryland noticed the federal questions sought to be reviewed and said (93 A. 2d at p. 282):

> "The question of the constitutionality of Chapter 704 is therefore presented for decision in Salsburg's case. We have decided to order a reargument on this constitutional question alone in Salsburg's case. * * *
>
> "* * * Reargument of constitutional question only ordered as to Salsburg."

e. Pursuant to the above mentioned Order for reargument, appellant's counsel filed an additional printed brief in the Court of Appeals of Maryland elaborating his contentions on the federal questions now sought to be reviewed

and particularly stressing the necessity for the finding of a "reasonable ground of difference" in order to sustain the constitutional validity of the territorial classification made by the challenged statute. Appellant's counsel also reargued orally before the Court of Appeals of Maryland the federal questions now sought to be reviewed.

f. In its second opinion and decision filed February 5, 1953, the Court of Appeals of Maryland sustained the constitutional validity of the challenged statute by saying:

> "Therefore, the paraphernalia would be admissible as to him [Salsburg, the present appellant] only in case the 1951 statute is valid. [94 A. 2d at p. 282]
>
> • • • • • • •
>
> "We now pass to the important question whether appellant was denied the equal protection of the laws when the Circuit Court of Anne Arundel County, in accordance with the 1951 statute, admitted illegally procured evidence against him at his trial for gambling, while the law makes illegally procured evidence inadmissible in trials for the same offense in twenty counties and the City of Baltimore.
> [94 A. 2d at p. 283]
>
> • • • • • • •
>
> "We, therefore, conclude that the statute assailed by appellant does not violate the Equal Protection Clause.
>
> "For these reasons we hold that the paraphernalia, although procured by illegal search and seizure, were admissible. As we find no error in the ruling of the trial Court, the judgment of conviction will be affirmed" (94 A. 2d at p. 285).

As hereinbefore stated, the Court of Appeals of Maryland is the highest Court of last resort in the State of Maryland. The judgment of said Court was entered on February 5, 1953, in the following terms: "Judgment affirmed, with

costs" (94 A. 2d at p. 285), and the same is a final judgment.

Questions Presented

1. Is it a violation of the Equal Protection Clause of Section 1 of the 14th Amendment of the Constitution of the United States for the Legislature of Maryland to amend a statute of state-wide application, which renders inadmissible in the trial of a misdemeanor any evidence procured as a result of an illegal search and seizure, by providing that such evidence shall be admissible in such a trial in a single county of the State, where no reasonable ground of difference exists between conditions in the territory selected for exemption and conditions elsewhere in the State?

2. Was the appellant denied the Equal Protection of the Laws under Section 1 of the 14th Amendment to the Constitution of the United States by the admission in evidence against him at his trial for a misdemeanor in the Circuit Court for Anne Arundel County (in accordance with the exemption contained in the amendatory statute now being challenged) of illegally procured evidence, notwithstanding the law renders illegally procured evidence inadmissible in trials for the same offense elsewhere in the State of Maryland.

3. Was the appellant denied the Equal Protection of the Laws under Section 1 of the 14th Amendment to the Constitution of the United States by the admission in evidence against him at his trial for the misdemeanor of "gambling" in Anne Arundel County (in accordance with the exemption contained in the challenged statute) of illegally procured evidence notwithstanding the law renders illegally procured evidence inadmissible in trials for all other misdemeanors in the same County?

4. Does the Equal Protection Clause of Section 1 of the 14th Amendment of the Constitution of the United States

apply so as to prohibit a State from making territorial classifications for the administration of justice and judicial procedure for different portions of the State, which said classifications are arbitrary, do not rest upon some reasonable ground of difference between conditions in the territory selected and conditions elsewhere in the State and do not bear a fair and substantial relation to the object of the legislation?

5. Does the subject matter of the challenged statute impinge upon a fundamental right implicit in the concept of ordered liberty so that it is not entitled to the same presumption of reasonableness and constitutionality which usually attends other types of legislation?

6. All the points raised in the Assignment of Errors are also presented. The Questions Presented as stated above set forth the major issues.

Statute Involved

The Maryland statute involved, the validity of which was sustained by the Court of Appeals of Maryland, is Acts of 1951, Chapter 704, which, as further amended by Acts of 1951, Chapter 710, is codified as Article 35, Section 5, Code of Public General Laws of Maryland, 1951 edition. The pertinent provisions of said statute are as follows:

> "No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case; * * *. Provided, further that nothing in this section shall prohibit the use of such evidence in Anne Arundel, *Wicomico and Prince George's*

Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 330-329, inclusive, of Article 27, sub-title 'Gaming', or in any laws amending or supplementing said sub-title." (Italics supplied.)

The words italicized, which brought Wicomico and Prince George's Counties within the exemption of the proviso, were added by Acts 1951, Chapter 710. The proviso itself was originally enacted by the challenged statute (Acts 1951, Chapter 704) as an amendment to the then existing law, and, as so enacted, it applied only to Anne Arundel County.

Statement of the Case

The appellant was convicted by the Circuit Court of Anne Arundel County of committing a misdemeanor by violating the gambling laws of the State of Maryland which prohibit the making of book on the result of horse races. The evidence upon which he was convicted was admittedly procured as a result of an illegal search and seizure by the police of Anne Arundel County, and its admissibility was dependent upon the constitutional validity of the challenged statute.

Prior to the trial on the merits, appellant filed a motion to suppress the evidence. The testimony taken in support of the motion disclosed that on the afternoon of May 21, 1952, Captain Wilbur C. Wade, of the Anne Arundel County Police force, in company with other officers, approached a small one room building in the rear of a certain garage situated on the Governor Ritchie Highway, Anne Arundel County, Maryland. It was stipulated that no search warrant had been issued for the invasion of these premises. The door to the premises was locked. Captain Wade admitted that he could not see into the premises because the window was painted, and that he could not hear any sounds

coming from the room. All that the officers saw were some telephone wires leading into the premises. They tried to get someone to come to the door and open it, but no one answered. The police then forced the door open with an axe. The appellant was found in the room. A search of the room revealed incriminating evidence which was seized by the police. Captain Wade made no pretense at justifying his forceable entry into the premises on the basis of any preliminary sensory discovery indicating commission of a crime. He frankly admitted that he broke into the room solely "upon the advice of the State's Attorney" (R. 8-10).

The trial Court in stating the problem before it said that if the challenged statute were valid the police "would have *a right to go into the premises* on the assumption the Amendment of the Bouse Act *gave them that right.*" (Italics supplied.) (R. 7). Thereafter the trial Court overruled the motion to suppress the evidence, impliedly holding that the challenged statute was constitutional. (See 93 A. 2d at p. 282, where the Court of Appeals of Maryland said: "The fair implication * * * is that the motions were overruled because the act was held constitutional * * *.")

At the trial on the merits the timely objections of appellant to the introduction of the evidence were overruled. The trial Court, sitting without a jury, found appellant guilty as charged and sentenced him to six months in the Maryland House of Correction and to pay a fine of one thousand dollars and costs.

The appellant had been tried jointly with two other defendants (Joseph John Rizzo and Wm. Raymond Nicholson), who were also convicted and who received the same sentence, and all three defendants perfected an appeal to the Court of Appeals of Maryland. In the first opinion of the Court of Appeals of Maryland (93 A. 2d 280), the

judgment and sentence of the trial Court was affirmed as to the other two defendants because it was held that they had no interest in the premises searched and therefore had no status to object to the illegal search and seizure. The appellant, Julius Salsburg, however, was found to have a proper interest in the premises and the constitutional question only was ordered reargued as to him. Following the reargument, the Court of Appeals of Maryland held the challenged statute valid and affirmed the judgment and sentence as to the present appellant, Julius Salsburg. The present appeal, therefore, is solely on behalf of Julius Salsburg.

The Questions Are Substantial

For the sake of clarity in presenting appellant's contention that the questions involved in this appeal are substantial, it is deemed desirable to trace briefly the history of the challenged statute.

Prior to the enactment of Chapter 194, Acts of 1929 (now codified, as subsequently amended, in Art. 35, Sec. 5, Md. Code, 1951) the Maryland Court of Appeals rejected the federal rule of exclusion of illegally procured evidence, and such evidence was admitted in criminal trials involving all categories of crime. *Meisinger* v. *State*, 155 Md. 195 (1928). As a result of this decision, the Legislature enacted Chapter 194 of the Acts of 1929, popularly known as the Bouse Act. This statute, which was state-wide in its application, rendered such evidence inadmissible in the trial of all misdemeanors, thus partially adopting the federal rule of exclusion. As to prosecutions for felonies the old rule of admissibility remained the same and is still in force. *Marshall* v. *State*, 182 Md. 379 (1943); *Delnegro* v. *State*, 81 A. 2d 241 (Md. 1951). Thus Maryland adopted a hybrid position on the important question of how best to secure

to the citizen his fundamental right of security against arbitrary intrusion upon his privacy by the police.

Following the enactment of the Bouse Act, the Court of Appeals of Maryland characterized it by saying that it "fairly summed up" the immunities guaranteed by Articles 22 and 26 of the Maryland Declaration of Rights, which are in *pari materia* with the 4th and 5th Amendments to the Constitution of the United States. *Bass* v. *State*, 182 Md. 496, 500 (1943). Somewhat earlier, the same Court warned that "An examination of the statute books of the Federal Government and the states demonstrates the necessity for these constitutional barriers because they indicate a ceaseless steady pressure on the part of government to lessen the difficulty of convicting persons charged with crime by encroaching on these immunities". *Miller* v. *State*, 174 Md. 362, 370 (1938). The "ceaseless pressure" alluded to was successfully resisted in Maryland for almost 20 years after the enactment of the Bouse Act. However, in 1947 a small hole was made in the partial dike erected by the Bouse Act when the Baltimore County Delegation in the Maryland Legislature succeeded in securing the enactment of Chapter 752 of the Acts of 1947, which amended the Bouse Act so that—"nothing in this section shall prohibit the use of such evidence in Baltimore County in the prosecution of any person for unlawfully carrying a concealed weapon". At the 1951 session of the Legislature, other local delegations succeeded in enlarging the breach by securing the enactment of Chapter 145 of the Acts of 1951, whereby Baltimore City and thirteen counties joined Baltimore County in the exemption of concealed weapons cases. At the same session the Anne Arundel County delegation secured the passage of the amendatory statute now being challenged (Ch. 704, Acts 1951) and the Wicomico and Prince George's Counties delegations joined

Anne Arundel County by securing the passage of Chapter 710 of the Acts of 1951. At the 1952 session of the Maryland Legislature Chapter 59 of the Acts of 1952 was enacted whereby a new section was added to the law, making the exemption from the Bouse Act of concealed weapons cases state-wide in its application (Art. 35, Sec. 5A, Md. Code, 1951). There are no recorded legislative debates pertaining to Chapter 59 of the Acts of 1952 disclosing the considerations which prompted its passage. However, it is a fair statement to say that its purpose was to make the "concealed weapons" exemption from the Bouse Act state-wide in its application in order to eliminate any question of a violation of the Equal Protection Clause of the 14th Amendment of the Constitution of the United States. The point had never been formally raiscd and adjudicated, but many leading members of the Maryland Bar had often expressed serious doubts on the point. (For a similar legislative procedure, making a special rule of evidence in paternity cases state-wide in its application after a statute confining its operation to New York City had been declared unconstitutional by an intermediate appellate court, see *Commissioner of Public Welfare* v. *Koehler*, 30 N.E. 2d 587, 590 (N. Y. 1940), referring to *Krushel* v. *Ladutko*, 11 N. Y. S. 2d 747, 749.)

In the case at Bar, the only statute before the Court is Chapter 704 of the Acts of 1951 which involves a double classification. The first or primary classification is territorial in its effect by exempting one County of the State from the state-wide statutory rule of exclusion of illegally procured evidence. The secondary classification selects for discrimination violations of the "Gaming" laws, leaving all other misdemeanors committed within the one County in question subject to the state-wide rule of exclusion. No question is involved here as to the power of the State of

Maryland to repeal *in toto* the legislative evidentiary rule of exclusion embodied in the Bouse Act, and thereby revert to the former judicial rule of inclusion for misdemeanor cases as well as for felonies. Such action would not involve class legislation with the concomitant necessity, as in the case at Bar, of finding a "reasonable ground of difference" to support the discrimination inherent in the challenged statute. In the case at Bar, the basic challenge to the statute involved is grounded upon the fact that both the primary and secondary classifications which it makes are arbitrary and without any rational basis to support them, and, therefore, it deprives the appellant of the equal protection of the laws as provided in Section 1 of the 14th Amendment of the Constitution of the United States.

1. At the two oral arguments in the Court of Appeals of Maryland, it was virtually conceded by the State that there was no difference between conditions in Anne Arundel County and elsewhere in the State which would furnish a reasonable basis for the discrimination inherent in the challenged statute. The principal contention of the State was that the only authorities in point here are those dealing with the right of a State to make territorial discriminations in regulating the administration of justice and judicial procedure within its boundaries. The State's greatest reliance was upon *Missouri* v. *Lewis*, 101 U. S. 22 (1880) and the decisions of the Supreme Court which have cited and followed it. From these decisions, the State distilled a principle, the essence of which is that in cases involving the administration of justice and judicial procedure the admitted *power* to set up territorial classifications is not subject to the otherwise basic requirement that class legislation must not be arbitrary and must be founded upon a reasonable difference between conditions in the territory selected and

elsewhere in the State. The Court of Appeals of Maryland adopted this distorted view of *Missouri* v. *Lewis*. In sustaining the statute now challenged, the Court, relying upon *Missouri* v. *Lewis*, expressly held that the Equal Protection Clause of the federal Constitution, "has no reference to municipal or territorial arrangements made for different portions of the State" (94 A. 2d at p. 284). After making this flat statement, the Court sought to temper its clear implication by paying lip service to the requirement of "reasonableness". The arrangements in question should not, the Court added, "injuriously affect or discriminate between persons or classes of persons within the municipalities or counties for which such regulations are made" (Ibid.). However, the Court made no attempt to point out any possible difference between conditions existing in Anne Arundel County and elsewhere in the State. Nor did it make even a passing reference to any possible difference in Anne Arundel County between various misdemeanors which might justify treating persons charged with gambling in that County differently from those malefactors who operate bawdy houses, illegal stills or engage in a conspiracy to commit the most heinous crime there (all being misdemeanors).

This clear misinterpretation of *Missouri* v. *Lewis* demonstrates the substantiality of the questions presented by this appeal. In that case, the Supreme Court of the United States sustained the validity of Missouri statute and constitutional provision which allowed an appeal to the highest court of that State from a final judgment of the Circuit Courts of certain Counties. Other Counties were excepted from these provisions, and a separate appeal court was provided for them. The language of the opinion, which was relied upon by the Court of Appeals of Maryland in the case at Bar, was nothing more than an abstract statement of the principle which sustained the *power* to set up terri-

torial classifications and which, for the purpose of its statement, ignored or rather assumed the requirement that there be some reasonable basis for the discrimination. The abstract statements contained in *Missouri* v. *Lewis*, which have been frequently quoted and relied upon, are authority only for the *power* to classify, and they have no bearing on the important question of *reasonableness*. In any case of classification, whether the subject matter of the legislation involves taxation, licensing, economic activities or judicial administration and procedure, two questions are invariably presented and must be determined. The first question is the *power* to classify and the second is the *reasonableness* of the particular classification. In the case at Bar, the Court of Appeals of Maryland correctly held that the *power* to classify existed but erroneously concluded that since the subject matter of the challenged statute related to judicial administration and procedure it was not necessary to find *reasonableness* because the Equal Protection Clause of the federal Constitution does not apply to such territorial arrangements.

Missouri v. *Lewis* does not support such a conclusion. Indeed practically all the Supreme Court decisions which cite and rely upon *Missouri* v. *Lewis* either assume "reasonableness" of the classification without discussion because it was immediately suggested to the most ordinary intelligence and perception or expressly found its existence in the unequal distribution of population in the territories affected. For illustrations of the former category, see: *Maxwell* v. *Dow*, 176 U. S. 581 (1900); *Mallett* v. *North Carolina*, 181 U. S. 589 (1901); *Gardner* v. *Michigan*, 199 U. S. 325 (1905); *Graham* v. *W. Virginia*, 224 U. S. 616 (1912); *Ocampo* v. *United States*, 234, U. S. 91 (1914); *Ohio* v. *Akron Metrop. Pk. Dist.*, 281 U. S. 74 (1930). For illustrations of the second category, see: *Hayes* v. *Missouri*,

120 U. S. 68 (1887); *Morris* v. *Alabama*, 302 U. S. 642 (1937), a per curiam dismissal of an appeal from the highest court of Alabama, whose opinion in 175 So. 283 expressly found reasonableness in the classification based on population differences; *Fort Smith* v. *Board of Improvement*, 274 U. S. 387, 391 (1927); *Jannett* v. *Windham*, 290 U. S. 602 (1933), a per curiam affirmance of an appeal from the highest court of Florida, whose opinion in 147 So. 296, expressly held that in view of the population differences involved "the provisions of the statute are based on a just and reasonable classification with reference to the subject regulated". Cf. dissenting opinion of one of the Florida judges.

The Supreme Court has clearly and expressly recognized that the abstract statement of the power to classify as laid down in *Missouri* v. *Lewis* is subject to the qualification that there must be a reasonable basis for the classification. In addition to the cases cited above, attention is directed to *Atchison, Topeka, etc. Rwy. Co.* v. *Matthews*, 174 U. S. 96, 105, 106 (1899), where the Court expressly cited *Missouri* v. *Lewis* as belonging in that category of cases where the statute in question was sustained because there appeared to be some reasonable basis for the classification. To the same effect is *Truax* v. *Corrigan*, 257 U. S. 312, 336 (1921). In the dissenting opinion of Justice Brandeis in *Louisville Gas Co.* v. *Coleman*, 277 U. S. at 44, footnote 1, *Missouri* v. *Lewis* is expressly catalogued with cases which have sustained classifications based on population differences. In *Holden* v. *Hardy*, 169 U. S. 366, 388, 389 (1898), after quoting from *Missouri* v. *Lewis* to show that each State has the right and power to adopt any system of laws or judicature it sees fit for any part of its territory, the Supreme Court said, at p. 389:

> "We do not wish, however, to be understood as holding that this power is unlimited. • • • the 14th

> Amendment contains a sweeping provision forbidding the states from * * * denying * * * the benefit of due process or equal protection of the laws."

It is thus apparent that the Court of Appeals has misinterpreted the decision in *Missouri* v. *Lewis*. However broad the power of a State to set up territorial classifications with respect to systems of laws or judicature, it is subject to the requirement of reasonableness inherent in the Equal Protection Clause of the 14th Amendment. In the cases cited and referred to above, the practical necessities of judicial administration in dealing with a population unequally distributed over a State was the very basis for sustaining (either expressly or impliedly) statutes setting up a variety of criminal or appellate courts, regulating the right to a jury trial or the State's right to appeal, and specifying the political sub-divisions in which preliminary hearings in criminal cases are or are not allowed, etc. In the case at Bar there are no such considerations to sustain the challenged statute. Population differences are wholly irrelevant and bear no reasonable relation to the subject matter of the challenged statute. Indeed, at the first oral argument of this case in the Court of Appeals of Maryland, Chief Judge Charles Markell (who was retired from the bench after writing the first opinion in this case, 93 A 2d 280, and who was no longer on the bench when the case was reargued) expressly stated that he could not see any possible difference in relation to the subject matter at Bar between Anne Arundel County and those Counties which bordered upon it, such as Calvert and Howard Counties, which might justify different treatment. He pointedly asked the Assistant Attorney General, who argued the case for the State of Maryland—appellee, whether he could suggest any such difference. The Assistant Attorney General frankly admitted that he could not.

2. The closest analogy to the case at Bar is found in two decisions of the New York Appellate Division, First Department. The first is *Krushel* v. *Ladutko*, 11 N. Y. S. 2d 747 (1939), aff'd on other grounds, 281 N. Y. 655. The second is *Commissioner of Public Welfare* v. *Torres*, 31 N. Y. S. 2d 101 (1941). In the *Ladutko* case, the Court had before it a statute which in substance provided that in Paternity Proceedings in New York City, the mother of the "natural child" and her husband shall be permitted to testify to non-access. The common law rule, rendering such evidence inadmissible, applied elsewhere in the State of New York. In holding the statute in violation of the Equal Protection Clause of the 14th Amendment, the Court said, at p. 749:

> "The statute which undertakes to effect a change in the common law rule by allowing such proof within the City of New York while such testimony is still inadmissible in the rest of the State, is based upon no reasonable ground for the distinction it makes. * * * This differentiation within the borders of the State should be based upon reasonable grounds. [Citing cases, including *Missouri v. Lewis*,] The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. * * * Here there appears to be no just or rational basis for the distinction made by the statute in question, and it is * * * unconstitutional."

In the *Torres* case an amendment to the Domestic Relations Law of New York provided in effect that in Paternity Proceedings conducted in New York City testimony of non-access by a person other than the defendant must be corroborated. In other parts of the State, the statute permitted such testimony without corroboration. In striking down this statute the Court rejected population differences

as a basis for sustaining the classification and said, at p. 104:

> "But the discrimination herein cannot reasonably be construed as affecting an evil that exists only in one City of the State and has no existence in all other parts of the State."

The Court of Appeals of Maryland recognized the complete analogy of the decisions in those cases but expressly refused to follow them, saying at p. 284 of 94 A 2d: "We are unwilling to base our decision on that opinion." Instead, the Court, in addition to *Missouri* v. *Lewis*, relied by way of analogy upon *Davis* v. *State*, 68 Ala. 58 (1880); *People* v. *Hanrahan*, 75 Mich. 611 (1889); and *Ohio, ex rel. Lloyd* v. *Dollison*, 194 U. S. 445 (1904). The Court declared that these authorities stand for the general proposition that the equal protection of the laws is not denied by statutes which declare that certain acts are criminal in some counties but not in others (94 A. 2d at 285). An examination of these authorities will disclose that they are not in point and do not support the underlying *ratio decidendi* of the decision of the Court of Appeals of Maryland in the case at Bar, which is that there is no necessity for a finding of reasonableness in a territorial classification which purports to regulate judicial procedure in various parts of the State because the Equal Protection Clause of the 14th Amendment has no application to such regulations. Thus in *Davis* v. *State, supra*, the Alabama Court expressly referred to a reasonable basis for the statute which made it unlawful within certain counties to transport any cotton in the seed after sunset and before sunrise of the succeeding day. The Court said (see p. 63 of 68 Ala.):

> "Its object is to regulate traffic in the staple agricultural product of the State, so as to prevent a prevalent evil, which in the opinion of the law-making power may

have done much to demoralize agricultural labor and destroy the legitimate profits of agricultural pursuits to the public detriment, at least within the specified territory."

People v. *Hanrahan, supra,* did not involve a statute making acts criminal in one County and not in others. The statute in question involved a Home Rule provision of an Illinois Act which granted power to the City of Detroit to prohibit houses of ill fame in that City and to prescribe the penalty for violation of any ordinance passed pursuant thereto. The ordinance passed pursuant to the enabling act was sustained although it prescribed a different penalty than was prescribed by the state-wide law against maintaining houses of ill fame.

Ohio, ex rel. Lloyd v. *Dollison, supra,* involved a local option law regulating the liquor traffic in a certain township. It has long been settled that such laws are in a different category as "the state has absolute power over the subject. It does not abridge that power by adopting the form of reference to a local vote". (See *Rippey* v. *Texas,* 193 U. S. 504, 510.)

3. Aside from the unreasonableness of the primary territorial classification of the challenged statute, the secondary classification whereby "gambling" is selected for discriminatory treatment from the great body of misdemeanors is a clear denial to appellant of the equal protection of the laws. By virtue of the challenged statute, one charged in Anne Arundel County as an operator of a bawdy house or an illegal still or as having conspired with another to commit the most heinous crime (all misdemeanors under the law of Maryland) is protected in the full enjoyment of his constitutional immunities, while a citizen charged with gambling in Anne Arundel County is beyond the pale of this same full protection. With rela-

tion to the subject matter at Bar, it is impossible to conceive any rational difference between particular classes of misdemeanants in Arundel County which would support the discrimination against suspected gamblers. The Court of Appeals of Maryland certainly did not find or even suggest any such difference. Indeed no one would suggest that bootleggers, bawdy house operators and conspirators are easier to catch and convict in Arne Arundel County than gamblers, even if such a consideration could properly be employed to sustain the kind of discrimination involved in the challenged statute.

In *Commissioner of Public Welfare* v. *Koehler*, 30 N.E. 2d 587 (N. Y. 1940) a state-wide statute permitting evidence in Paternity Proceedings of non-access by the husband of the mother of a "natural child" was sustained even though in other types of cases such evidence is excluded by the applicable common law rule. The Court said, at p. 591:

> "It is not unreasonable that in a statutory proceeding to enforce a duty imposed by statute upon the father of a 'natural child' the mother of the child and her husband should be permitted to give testimony which they would not be permitted to give where an adjudication of the status of the child is sought. * * * the foundation of the rule is much firmer when it is invoked for the protection of the child or of the parties to the marriage or of the public, than when invoked as a shield by an alleged adulterer against liability for the consequences which follow from his wrong."

The *Koehler* case clearly demonstrates the necessity for and the kind of rational basis which is required to sustain the application of one rule of evidence to a particular class of cases and a different rule to other cases. In the absence of such a reasonable basis for the discrimination, the rule of evidence would be lacking in that degree of impartiality and uniformity which is essential to its constitutional

validity. See Cooley, Const. Limitations (8th Ed.), vol. 2, pp. 768-769. In the case at Bar there is no reasonable difference between various categories of misdemeanants in Anne Arundel County which would justify the admission of illegally procured evidence against one and its exclusion against all others. All misdemeanants in Anne Arundel County are in the same class. Here, indeed, is the very discrimination "between persons or classes of persons within the municipalities or counties for which such regulations are made" which the Court of Appeals of Maryland, in its lip service to the requirement of "reasonableness", conceded ran counter to the 14th Amendment. 94A 2d at p. 284, *supra*.

4. In an attempt to bolster its decision, the Court of Appeals of Maryland referred in its opinion to the presumption of reasonableness and constitutionality which generally attends a legislative enactment. (94A 2d at p. 284). Aside from any other considerations, such a presumption cannot save a statute, such as the one at Bar, which proposes a classification manifestly and obviously arbitrary and unreasonable on its face. It was expressly so held in *Bailey* v. *Drexel*, 259 U. S. 20, 37, 38. See also 2 Sutherland, Statutory Construction (3rd Ed.) sec. 4509.

In the case at Bar the subject matter of the challenged statute impinges upon one of the most fundamental immunities of the citizen, namely, the right to be secure in one's privacy against arbitrary intrusion by the police. As was said in *Wolfe* v. *Colorado*, 338 U. S., 25, at pp. 27, 28 (1949):

> " * * * It is, therefore, implicit in the 'concept of ordered liberty' and as such, enforceable against the States through the Due Process Clause. * * * Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion

into privacy, it would run counter to the guaranty of the Fourteenth Amendment."

Where the subject matter of a challenged statute deals with one of the fundamental immunities of the citizen it is not entitled to the same presumption of reasonableness and constitutionality which usually attends other types of legislation. *United States* v. *C. I. O.* 335 U. S. 106, 140 (1948); *Ex Parte Mitsuye Endo*, 323 U. S. 283, 299 (1944); *Byars* v. *United States*, 273 U. S. 28, 32 (1927); *Ex Parte Rhodes*, 79 So. 462, 464, 465 (Ala. 1918), quoting Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616; *"The First Ten Amendments"*, by Paul G. Kauper, 37 Amer. Bar Asso. Jr. 717, 718 (1951); *American Jurisprudence, Const. Law*, secs. 59-60. The statute involved in the case at Bar is such a statute, and it can draw no support or vitality from a mere presumption of validity.

5. To further demonstrate the substantiality of the questions involved in this appeal, appellant shows that the trial court, in sustaining the constitutionality of the challenged statute, made the pernicious assumption that under the statute the police of Anne Arundel County no longer have to worry about whether a crime has been committed in their presence because "they would have a *right* to go into the premises on the assumption the amendment of the Bouse Act gave them that *right*". (Italics Supplied) (R. 7). It is true that the Court of Appeals of Maryland in affirming the judgment of the trial Court made no reference to this view of the trial Judge. Nevertheless, the clear effect of the challenged statute, as interpreted and applied, is to incite and encourage the police of Anne Arundel County to ignore the constitutional immunities and to invade the privacy of the citizens of Anne Arundel County at will in cases of suspected gambling. No longer need the police of Anne Arundel County concern themselves with the pro-

curement of a search warrant, for which full and adequate provision is made under the laws of the State of Maryland. (Art. 27, secs. 328, 329, Md. Code, 1951). As thus applied and interpreted the challenged statute, through a sort of "negative direction" contains the kind of "affirmative sanction" to override the constitutional barrier which runs "counter to the guaranty of the Fourteenth Amendment." *Wolfe* v. *Colorado*, 338 U. S. 25, 27, 28 (*supra*).

In conclusion, it is submitted that the Court of Appeals of Maryland has misconstrued and misapplied the decision of the Supreme Court in *Missouri* v. *Lewis* and other relevant and controlling decisions. Appellant believes and earnestly contends that the questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

HERBERT MYERBERG,
JOSEPH LEITER,
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Counsel for Appellant.

APPENDIX A

COURT OF APPEALS OF MARYLAND

No. 49, October Term, 1952—Filed December 12, 1952

JOSEPH JOHN RIZZO, WILLIAM RAYNARD NICHOLSON, JULIUS SALSBURG

vs.

STATE OF MARYLAND

Three Appeals in One Record from the Circuit Court for Anne Arundel County. Benjamin Michaelson, Judge

Argued by Herbert Myerberg, Baltimore, Md., (Joseph Leiter, Baltimore, Md., and Louis M. Straus, Annapolis, Md., on the brief) for appellants.

Argued by Ambrose T. Hartmann, Assistant Attorney-General, (J. Edgar Harvey, Acting Attorney-General, both of Baltimore, Md.; Albert J. Goodman, State's Attorney, Anne Arundel County, and C. Osborne Duvall, Assistant State's Attorney, Anne Arundel County, both of Annapolis, Md., on the brief) for appellee.

Argued before Markell, Chief Judge; Delaplaine, Collins and Henderson, JJ.

Criminal Law—Evidence Seized Without Warrant to Enter Property—Constitutionality of Act Exempting Anne Arundel County From Bouse Act

Police entered premises of Salsburg without a warrant. The Bouse Act, preventing introduction of evidence illegally seized, exempted by Chapter 704, Acts of 1951, Anne Arundel County from its provisions. Objection of Rizzo and Nicholson to the introduction of such evidence was dismissed, as they had claimed no ownership. Salsburg, owner, contended he was denied equal protection of the law.

Held: Re-argument allowed on question of constitutionality of Chapter 704, Acts of 1951.

Judgment affirmed as to Rizzo and Nicholson. Reargument only of constitutional question ordered as to Salsburg.

MARKELL, *C. J.*:

These are appeals from judgments and sentences on conviction of bookmaking. Defendants were arrested on warrants charging bookmaking. Before the magistrate the State's Attorney prayed jury trial. In the circuit court the case was tried without a jury. Code of 1951, Art. 52, sec. 14. *Wilson vs. State*, — Md. —, 88 A. 2d 564.

Before issuance of the warrants for arrest, and without a search warrant or any warrant at all, members of the Anne Arundel County police force, "upon the advice of the State's Attorney", entered by the use of an axe the rear room of a small two-room building in the rear of Roland Terrace Garage, at the intersection of Third Street and Governor Ritchie Highway. There the officers arrested defendants and seized "incriminating evidence" [appellants' brief], the nature of which is not specified in either brief or appendix. There were three telephones there, and three telephone wires leading in. Motions of each defendant that "the articles, items and property enumerated in the return of the police as taken from the premises of your defendant, and all other property of the defendant in custody of the State taken from this defendant * * * be returned to your petitioner" were overruled. Presumably (it does not affirmatively appear) the articles seized were admitted in evidence.

As amended by Chapters 704 and 710 of the Acts of 1951 [approved May 7, 1951, effective June 1, 1951], the Bouse Act (Code of 1951, Art. 35, sec. 5) contains a proviso, "Provided, further, that nothing in this Section shall prohibit the use of such evidence in Anne Arundel, Wicomico and Prince George's Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title 'Gaming', or in any laws amending or supplementing said sub-title." As to Anne Arundel County this proviso was added by Chapter 704, as to Wicomico and Prince George's by Chap-

ter 710. Defendants contend that Chapter 704 denies them the equal protection of the laws and is unconstitutional. The State contends that the act is constitutional, and also that defendants had no title or interest in or to the premises searched and therefore no right to complain of the search and seizure as illegal.

There is no evidence—and no allegation other than any implication in mention of "the premises of your defendant" in the unsworn petitions for return of property seized—that defendant Rizzo and Nicholson had any interest in the premises. Defendants say it is sufficient that they claim the property seized. They cite *United States vs. Jeffers*, 342 U. S. 48, and the often repeated statement of this court that "one cannot complain of an illegal search and seizure of premises *or* property which he neither owns, nor leases, nor controls, nor lawfully occupies, nor rightfully possesses, or in which he has no interest." [Italics supplied.] *Baum vs. State*, 163 Md. 153, 157. Although this statement in the *Baum* case was believed to be supported by many cited state and federal cases, including one Supreme Court case, it appears that recent Supreme Court cases recognize a broader right to complain. *United States vs. Jeffers*, 342 U. S. 48, citing *McDonald vs. United States*, 335 U. S. 451, 456. In the *Jeffers* case narcotics seized without a search warrant in a hotel room of defendant's aunts, in the absence of defendant and his aunts, were ordered suppressed as evidence, though not returned to defendant because they by law were contraband. The decision was not based on the ground that the seizure was illegal, though the search was not (as to the defendant), but on the ground that "the search and seizure" were "incapable of being untied", and therefore were an invasion of the defendant's rights, though he had no interest in the premises. We need not further pursue the *ratio decidendi* in the *Jeffers* case. If it supports defendants' contention in the instant case, it is contrary to the often repeated statement of this court in the *Baum* case.

We are not infrequently reminded by counsel of our statement in *Wood vs. State*, 185 Md. 280, 285, that "The Bouse Act and the Act of 1939 amount to adoption *pro tanto* of the Supreme Court decisions under the Fourth

Amendment." The context shows that the extent of *pro tanto* was the meaning of "illegal search and seizure" as dependent upon want of "probable cause."

In the instant case defendants were convicted on a charge of "making or selling a book or pool on the result of a running race of horses". "Incriminating evidence" to support that charge necessarily showed that defendants were "using and occupying" the building for bookmaking, an offense committed in the officers' presence. Since, therefore, defendants Rizzo and Nicholson could not complain that the search of the premises, in which they had no interest, was illegal, the arrest of them without a warrant and seizure of this evidence was not unlawful as to them.

Defendant Salsburg testified that he rented the premises by an oral lease, at $50 a month, for no definite term, from a named owner, and that he paid the rent to the owner in cash. This testimony was uncorroborated but uncontradicted. It was received by the judge with evident suspicion, but the judge did not say that he did not believe it or that he overruled Salsburg's motion to return on that ground. We cannot hold that the judge (who saw the witness) could not believe Salsburg's testimony and should have overruled his motion on that ground. The fair implication, in the absence of anything to the contrary, is that the motions were overruled because the act was held constitutional and not because Salsburg had no right to raise the question. *Cf. Lambert vs. State*, — Md. —, 75 A. 2d 327, 328.

In *Sugarman vs. State*, 173 Md. 52, 57-58, we held that a motion, before trial, to declare a search warrant null and void and to suppress use of the articles seized as evidence and compel return of them was "founded upon no statute of this State", nor "supported by precedent to justify its propriety." In *Smith vs. State*, 191 Md. 329, 334, and in *Asner vs. State*, 193 Md. 68, 73, 65 A. 2d 881, 883, we noted that such a motion to quash a search warrant is now authorized by statute. Code of 1951, Art. 27, sec. 328. In the instant cases the motions made are not authorized by statute, but are closely analogous to motions to quash. Rule 3(1) of the Criminal Rules of Practice and Procedure provides that, "Any defense or objection which is capable of determination without the trial of the general issue may be

raised before trial by motion." Rule 3(4) provides that, "A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue." In the instant cases the court did dispose before trial of the questions thus raised. This rule includes the motions in the instant cases.

The question of the constitutionality of Chapter 704 is therefore presented for decision in Salsburg's case. We have decided to order a reargument on this constitutional question alone in Salsburg's case. For the reasons already stated, the judgment will be affirmed as to Rizzo and Nicholson.

Judgment affirmed with costs as to Rizzo and Nicholson. Reargument of constitutional question only ordered as to Salsburg.

COURT OF APPEALS OF MARYLAND

No. 49, October Term, 1952—Filed February 5, 1953.

JULIUS SALSBURG

vs.

STATE OF MARYLAND

Appeal from the Circuit Court for Anne Arundel County, Benjamin Michaelson, Judge.

Reargued by Herbert Myerberg, Baltimore, Md., (Joseph Leiter, Baltimore, Md., and Louis M. Strauss, Annapolis, Md., on the brief) for appellant.

Reargued by Ambrose T. Hartman, Assistant Attorney-General, Baltimore, Md., (Edward D. E. Rollins, Attorney-General, Baltimore, Md.; Albert J. Goodman, State's Attorney, Anne Arundel County; and C. Osborne Duvall, Assistant State's Attorney, Anne Arundel County, both of Annapolis, Md., on the brief) for appellee.

Argued before SOBELOFF, Chief Judge; DELAPLAINE, COLLINS and HENDERSON, JJ.

Constitutional Law—Fourteenth Amendment—Equal Protection of the Law Clause—Amendment to Bouse Act—Bookmaking

Amendment to Bouse Act, which makes inadmissible in misdemeanor cases evidence illegally seized, excepted Anne Arundel County from the provisions of the Act. The appellant alleged this amendment was unconstitutional as denying him equal protection of the law as provided by the Fourteenth Amendment to the Federal Constitution.

Held: The statute does no more than change a rule of evidence and the State has the right to control the procedure in its courts. This did not deny appellant equal protection of the law.

Judgment affirmed.

DELAPLAINE, J.—Julius Salsburg, who was convicted by the Circuit Court for Anne Arundel County of bookmaking on horse races, is challenging here the constitutionality of Chapter 704 of the Laws of 1951, which amends the statutory rule of evidence known as the Bouse Act, Laws 1929, ch. 194, by adding a proviso that the Act shall not prohibit the admission of illegally procured evidence in Anne Arundel County in prosecutions for violations of the State gambling laws.

The Act was also amended by Chapter 710 of the Laws of 1951, which provides that the Act shall not prohibit the admission of such evidence in Wicomico and Prince George's Counties. Thus the Act, as codified in Code 1951, art. 35, sec. 5, provides as follows:

> "No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State * * *. Provided, further, that nothing in this section shall prohibit the use of such evidence in Anne Arundel, Wicomico and Prince George's Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title

'Gaming', or in any laws amending or supplementing said sub-title."

Salsburg and two other men, Joseph John Rizzo and William Raynard Nicholson, were arrested by five officers of the Anne Arundel County Police Department on May 21, 1952, in a two-room building in the rear of a garage along the Governor Ritchie Highway at Brooklyn. When the police officers appeared on the scene, the front door was open but the door to the rear room was locked. They rapped on the door to the rear room, but, as no one answered, they broke the door open with an ax. Upon entering the room they arrested defendants and seized three telephones, two adding machines, racing forms and other paraphernalia. While the officers were in the building many telephone calls came from persons wanting to make bets.

Before the trial defendants filed motions to suppress the evidence and dismiss the proceedings. It was conceded that the police officers raided the building without a search warrant and that they seized the gambling paraphernalia illegally. Defendants contended that the 1951 amendment of the Bouse Act violates the Fourteenth Amendment of the Constitution of the United States, and that the paraphernalia were inadmissible under the Bouse Act as it stood before the amendment. The Court overruled the motions and admitted the paraphernalia in evidence. The Court thereupon found each defendant guilty and sentenced each to the Maryland House of Correction for six months and to pay a fine of $1,000.

On December 12, 1952, the Court of Appeals held, in an opinion by Chief Judge Markell, that Rizzo and Nicholson could not complain of the illegality of the search and seizure, because they had no interest in the raided premises. Salsburg, on the other hand, testified that he was lessee of the building at the time of the raid. Therefore, the paraphernalia would be admissible as to him only in case the 1951 statute is valid. We ordered a reargument of his appeal on the question of the constitutionality of the statute. Rizzo vs. State, Md., 93 A. 2d 280.

Prior to the enactment of the Bouse Act in 1929, this Court held that where evidence offered in a criminal trial

is otherwise admissible, it will not be rejected because it was obtained illegally. Meisinger vs. State, 155 Md. 195, 141 A. 536, 142 A. 190; Heyward vs. State, 161 Md. 685, 158 A. 897; Baum vs. State, 163 Md. 153, 161 A. 244. This is still the rule in prosecutions for felonies in this State. Marshall vs. State, 182 Md. 379, 35 A. 2d 115; Delnegro vs. State, Md., 81 A. 2d 241, 244. The Bouse Act changed the rule only in trials for misdemeanors.

We find no reason to hold that the 1951 statute, making illegally procured evidence admissible in certain trials in Anne Arundel County, is in conflict with the Fourteenth Amendment of the Federal Constitution or Article 23 of the Maryland Declaration of Rights. It is true that in Weeks vs. United States (1914), 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, the United States Supreme Court held that evidence obtained in violation of the Fourteenth Amendment is inadmissible in the Federal courts. But in Wolf vs. People of State of Colorado (1949), 338 U. S. 25, 69 S. Ct. 1359, 1361, 93 L. Ed. 1782, the Court explicitly stated that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.

In explanation of the rule, Justice Frankfurter made the following comment: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. * * * Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution."

Appellant vigorously protested that the statute, partially exempting Anne Arundel County from the operation of the Bouse Act, will tend to give encouragement to the county

police to violate the law by invading private homes to make searches and seizures without a warrant. A similar protest was made by the defendant in People vs. Defore (1926), 242 N. Y. 13, 150 N. E. 585, 588, 589, but the Court of Appeals of New York announced that it preferred the State rule to the Federal rule. In that case Judge Cardozo said in the opinion of the Court: "We are confirmed in this conclusion when we reflect how far-reaching in its effect upon society the new consequences would be. The pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crime the most flagitious. * * * We do not know whether the public, represented by its juries, is today more indifferent to its liberties than it was when the immunity was born. If so, the change of sentiment without more does not work a change of remedy. Other sanctions, penal and disciplinary, supplementing the right to damages, have already been enumerated. No doubt the protection of the statute would be greater from the point of view of the individual whose privacy had been invaled if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice."

We now pass to the important question whether appellant was denied the equal protection of the laws when the Circuit Court for Anne Arundel County, in accordance with the 1951 statute, admitted illegally procured evidence against him at his trial for gambling, while the law makes illegally procured evidence inadmissible in trials for the same offense in twenty counties and the City of Baltimore.

Ever since the beginning of our Government, American political philosophy has been based upon principles of equality. Protection from unequal operation of the laws entitling a person to like privileges and burdens accorded to other persons in like circumstances is a basic American concept. It was thus natural that this concept was ex-

pressed in the guaranty of protection from arbitrary and unjust disparity of treatment contained in Federal and State Constitutions. The constitutional guaranty of equality is construed, however, to give full play to the powers of government so long as the exercise of those powers is clearly not an infringement of the rights of citizens.'

The principal guaranty of equality in American Constitutions is the clause in the Fourteenth Amendment to the Federal Constitution which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This amendment was proclaimed to be in force July 28, 1868. It was nearly five years afterwards when the Supreme Court construed the Amendment in the Slaughter-House Cases (1873), 16 Wall. 36, 81, 21 L. Ed. 394, 410. The Amendment had been submitted to the people to give protection to the Negroes, who had been recently emancipated, but those cases raised questions of the extent of the police power of the State and the granting of a monopoly. The Legislature of Louisiana had granted a monopoly of the slaughter-house business in New Orleans in favor of one corporation, thereby depriving many citizens of the right to engage in that business. The Court held that the statute did not violate any provision of the Fourteenth Amendment and that the subject of local monopoly was for the States, not for the Federal Government, to deal with. In referring to the Equal Protection Clause, Justice Miller said in the opinion of the Court: "The existence of laws in the States where the newly emancipated Negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. * * * We doubt very much whether any action of a state not directed by way of discriminaton against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."

That prophecy proved to be false. The majority of the litigants who have invoked the Equal Protection Clause have charged discrimination in economic legislation, rather than race discrimination. It is now universally recognized that the Equal Protection Clause guarantees that equal

protection shall be given to all persons under like circumstances in the enjoyment of their civil and personal rights; that all persons are equally entitled to acquire and enjoy property; that they shall have like access to the courts of the country; that no impediment shall be interposed to the pursuits of any person except as applied to the same pursuits by others under like circumstances; and that no greater burdens shall be laid upon one than are laid upon others in the same calling and condition. Barbier vs. Connolly, 113 U. S. 27, 5 S. St. 357, 28 L. Ed. 923.

It has been held that the power of the Legislature to regulate a business or occupation cannot be exercised arbitrarily or in such a manner as to deprive a citizen of rights, privileges, or property to which he is entitled as a matter of natural justice, except for the protection of some substantial public interest; nor can such power be exercised in such a manner as to impose upon members of a selected class burdens which are not shared by others in like circumstances. In so far as a statute grants privileges to or places burdens upon an individual, or limits his rights, especially his right to engage in a particular business or occupation, a statute may be invalidated by an arbitrary or unreasonable classification or discrimination in respect to territory. Herbert vs. County Com'rs of Baltimore County, 97 Md. 639, 644, 55 A. 376; Watson vs. State, 105 Md. 650, 655, 66 A. 635; Clark vs. Harford Agricultural & Breeders' Ass'n, 118 Md. 608, 620, 85 A. 503; Criswell vs. State, 126 Md. 103, 109, 94 A. 549. The classification must be reasonable and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, and the law shall apply equally to all persons similarly situated within the territory described in the act. Ocampo vs. United States, 234 U. S. 91, 34 S. Ct. 712, 715, 58 L. Ed. 1231; Royster Guano Co. vs. Commonwealth of Virginia, 253 U. S. 412, 40 S. Ct. 560, 64 L. Ed. 989; Ft. Smith Light & Traction Co. vs. Board of Improvement, 274 U. S. 387, 47 S. Ct. 595, 597, 71 L. Ed. 1112. The classification is presumed to be reasonable in the absence of clear and convincing indications to the contrary, and the person attacking the classification has the burden of

showing that it does not rest upon any reasonable basis but is essentially arbitrary. Lindsley vs. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369.

In State vs. Shapiro, 131 Md. 168, 173, 101 A. 703, it was held by this Court that a statute requiring different rates of license fees for the privilege of dealing in junk, according to the population of the county or city in which the business is conducted, does not deny any person the equal protection of the laws. On the contrary, in Dasch vs. Jackson, 170 Md. 251, 269, 183 A. 534, the Court held that a statute providing for the licensing and regulation of paperhangers in the City of Baltimore denied equal protection of the laws, because it had no substantial relation to the public health or safety and there was no rational basis for the territorial classification. Likewise, we held that the Strip Mining Act, Laws 1947, Sp. Sess., ch. 16, which discriminated between operators of coal mines in Garrett County and those in Allegany County, was unconstitutional, because there was no difference in the conditions in the two counties that would make strip mining a menace to public health and safety in Allegany but harmless in Garrett, and there was no rational basis for the territorial classification and no justification for the discrimination. Maryland Coal & Realty Co. vs. Bureau of Mines of State, 193 Md. 627, 69 A. 2d 471.

These principles have been recognized in cases dealing with statutes imposing licenses, taxes and other burdens in the exercise of the police power of the State. But those statutes are quite different from the statute now before us. This statute does no more than prescribe a rule of evidence.

It is true that one of the intermediate courts in New York has held that where a statute dealing with bastardy proceedings in all parts of the State outside of the City of New York permitted testimony of the defendant as to access by others without corroboration, another statute requiring corroboration of such testimony in proceedings brought in the City of New York was unconstitutional. Commissioner of Public Welfare vs. Torres, 263 App. Div. 19, 31 N. Y. S. 2d 101. We are unwilling to base our decision on that opinion. The Equal Protection Clause contemplates the

protection of persons or classes of persons against unjust discrimination by the State, but it has no reference to municipal or territorial arrangements made for different portions of the State that do not injuriously affect or discriminate between persons or classes of persons within the municipalities or counties for which such regulations are made. The State can establish any system of laws it sees fit for all or any part of its territory, provided that it does not encroach on the jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, or deprive any person of due process of law or equal protection of the laws. Thus it has been held that the Legislature has the power to declare that certain acts are criminal in some counties but not in others. Davis vs. State, 68 Ala. 58, 44 Am. Rep. 128, 132; People vs. Hanrahan, 75 Mich. 611, 42 N. W. 1124. For instance, the equal protection of the laws is not denied by a State local option law under which the traffic in intoxicating liquors may be made a crime in certain territory and permitted elsewhere. State of Ohio ex rel. Lloyd vs. Dollison, 194 U. S. 445, 24 S. Ct. 703, 48 L. Ed. 1062.

In emphasizing the right of the State to establish its own system of laws, Justice Bradley said in State of Missouri vs. Lewis (1880), 101 U. S. 22, 25 L. Ed. 989, 992: "If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. * * * If diversi-

ties of laws and judicial proceedings may exist in the several States without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State."

It has always been the policy of the State of Maryland to permit the enactment of local laws affecting only one county or the exemption of particular counties from the operation of general laws or some provisions thereof. Stevens vs. State, 89 Md. 669, 674, 43 A. 929, 931; Neuenschwander vs. Washington Suburban Sanitary Commission, 187 Md. 67, 48 A. 2d 593, 600. Moreover, the right of a citizen to have his controversies determined by existing rules of evidence is not a vested right. Rules of evidence relate to the remedies which the State provides for its citizens, and, like other rules affecting the remedy, they are subject at all times to modification by the Legislature. Mobile, Jackson, & Kansas City R Co. vs. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78; Luria vs. United States, 231 U. S. 9, 34 S. Ct. 10, 58 L. Ed. 101. Rules of evidence are not a constituent part of any contract and are not of the essence of any right which a party may seek to enforce. Generally speaking, therefore, the State, having the right to control procedure in its courts, has the power to regulate the admissibility of evidence without denial of equal protection of the laws. Illinois Central R. Co. vs. Paducah Brewery Co., 157 Ky. 357, 163 S. W. 239, 242. We, therefore, conclude that the statute assailed by appellant does not violate the Equal Protection Clause.

For these reasons we hold that the paraphernalia, although procured by illegal search and seizure, were admissible. As we find no error in the ruling of the trial Court, the judgment of conviction will be affirmed.

Judgment affirmed, with costs.